

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
LICENSE NO. 393799 and 97141  
Issued to: Louis H. OWEN

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

2049

Louis H. OWEN

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 21 April 1975, an Administrative Law Judge of the United States Coast Guard at New Orleans, Louisiana, suspended Appellant's seaman documents for 6 months outright upon finding him guilty of negligence. The specifications found proved allege that while serving as Operator on board the M/V MAMA LERE under authority of the licenses above captioned, on or about 29 January 1975, Appellant:

(1) wrongfully failed to maintain a proper lookout while navigating during a period of reduced visibility, thereby contributing to a collision between the M/V MAMA LERE and the SS AMERICAN WHEAT and

(2) wrongfully failed to sound proper fog signals during a period of reduced visibility.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and each specification.

The Investigating Officer introduced in evidence fourteen exhibits, and testimony of four witnesses.

In defense, Appellant offered in evidence six exhibits and his own testimony.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and two specifications had been proved. He then served a written order on Appellant suspending all documents, issued to Appellant, for a period of 6 months outright.

The entire decision and order was served on 23 April 1975 and

notice of appeal was timely filed.

#### FINDINGS OF FACT

On 29 January 1975, Appellant was serving as an operator on board the M/V MAMA LERE and acting under authority of his licenses while the vessel was underway at approximately Mile 87, above the Head of Passes, Mississippi River, when that vessel was involved in a collision with the SS AMERICAN WHEAT.

At about 1800 hours C.S.T. on 29 January 1975 the M/V MAMA LERE was upbound on the lower Mississippi River, pushing a tow in tandem formation consisting of the loaded tank barges TS-85, TS-86, and TS-87. The tow was bound from Texaco dock, Pilottown, Louisiana, near Mile 2 AHP, to Tenneco dock, NEW ORLEANS, Mile 89 AHP. Appellant had taken charge of the vessel at 1735 hours, and so remained up to the time of the collision. The M/V MAMA LERE was upbound at about 7 mph against a current of about 4 mph. In the vicinity of Mile 87 AHP there was a fog bank along the west bank of the river, to treetop height at the bank, and tapering down to a low level near the center of the river. The M/V MAMA LERE had its radar equipment in operation. Appellant was aware of the approach of another vessel, the SS AMERICAN WHEAT, and claims that he proposed, by radio, a starboard-to-starboard passing, and that the pilot of the SS AMERICAN WHEAT agreed by radio. No whistle signals were sounded. No bow lookout was posted, and M/V MAMA LERE was not sounding fog signals.

The SS AMERICAN WHEAT was downbound, in ballast, at a speed estimated at 7-9 knots, at the time of the collision. The pilot of the SS AMERICAN WHEAT had its radar equipment in operation, and had posted a bow lookout. Because the fog concealed the M/V MAMA LERE'S tow, the lookout and pilot of SS AMERICAN WHEAT could see only the upper portions of the M/V MAMA LERE until the tow was within 100-200 feet of the bow of the SS AMERICAN WHEAT. The pilot of the SS AMERICAN WHEAT testified he never agreed to a starboard-to-starboard passing, or gave any whistle signals in that regard. When he became aware of the tow, the pilot of SS AMERICAN WHEAT radioed to the pilot of M/V MAMA LERE to turn "hard right," and he also turned hard right, but impact occurred within a few seconds thereafter.

The bow of SS AMERICAN WHEAT struck the lead and second barges of M/V MAMA LERE's tow, causing tanks to rupture, and crude oil to spill in the river as a result. A fire started, which caused extensive damage to the barges and the SS AMERICAN WHEAT. No death or personal injury occurred.

#### BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is contended that:

- (1) the Appellant was denied a right to trial by jury under a statute where a penalty in excess of a fine \$500 was incurred;
- (2) the statute under which appellant was charged with negligence, R.S. 4450, 46 USC 239, is unconstitutionally "vague"; and
- (3) the Administrative Law Judge failed to fairly construe the evidence.

APPEARANCE: Poitevent and Hanemann, New Orleans, Louisiana, by John Poitevent, Esq.

### OPINION

#### I

Appellant argues that the right of the Commandant to revoke or suspend his licenses is in effect the right to impose a "penalty" of a criminal nature, with a monetary impact in excess of \$500, so that under the constitution the Appellant is entitled to a jury trial. It is argued on the basis of Fredenburg v. Whitney, 240 F.2d 819 (D.C. Wash. 1917), that R.S. 4450 is a penal statute.

An R.S. 4450 suspension and revocation proceeding has never been held to be a criminal action. See Commandant's Appeal Decisions 2029 (CHAPMAN) and 1986 (WATTS). "Administrative proceedings under 46 USC 239 have consistently been held to be a remedial sanction rather than a penal one since the primary purpose is to provide a deterrent for the protection of seaman and for safety of life at sea." Appeal Decision 1931 (POLLARD), affirmed by Bender v. Pollard, NTSB Order EM-33. The Federal Rules of Criminal Procedure do not apply. The argument that Appellant is entitled to a jury trial is, therefore, incorrect.

#### II

Appellant's contention that the statute on which this proceeding was predicated, R.S. 4450, fails to meet the due process requirement of the 14th Amendment because it is "vague", cannot be considered here. An executive agency such as the Coast Guard is not competent to pass the constitutionality of statutes it is charged with enforcing. An agency has the authority to construe the provisions of a statute it is charged with enforcing, L'Enfant Plaza North, Inc. v. District of Columbia Redevelopment Land

Agency, 300 F. Supp. 426 (1969); Doe v. Dept. of Transportation, FAA, 412 F. 2d 674, 678 (1969), and to promulgate regulations in implementation thereof, Udall v. Tallman, 380 U.S. 1, 85 S.Ct. 792, 801 (1965), but it may not resolve questions of the statute's Constitutionality, Appeal Decisions 1986 (WATTS) and 1382 (LIBBY); Engineers Public Service Co. v. S.E.C., 138 F.2d 936, 952-953 (1943); Public Utilities Commission v. United States, 355 U.S. 534, 539 (1958).

### III

Appellant asserts that the burden to prove the charges by a preponderance of the evidence rests upon the government. The burden of proof is indeed with the government, but only to prove the charges by "substantial evidence of a reliable and probative character," 46 CFR 5.20-95(b). The term "preponderance" of the evidence is incorrect for the purposes of an R.S. 4450 hearing. See Appeal Decision 2031 (CANNON), 1873 (TORREGANO) and 1880 (NATIVIDAD).

### IV

Appellant argues that the Administrative Law Judge construed the testimony of witnesses unfairly in determining that the M//V MAMA LERE was operating in a area of "reduced visibility." It is for the trier of fact to evaluate the evidence and determine the credibility of witnesses, and, absent a clear showing that his determination was arbitrary or capricious, his ruling will not be overturned on appeal. N.L.R.B. v. Materials Trans. Co., (C.A.5, 1969), 412 F. 2d 1074, 1080. "To disapprove such findings it must be found that they are not based on substantial evidence or that the evidence is so inherently unreliable, incredible, or irrelevant that no finding can be supported as a matter of law. When there is conflicting evidence, it is the function of the trier of the facts, the Judge, to assign weight to the evidence and to resolve conflicts." Appeal Decision 1931 (POLLARD). Since the record in this case discloses no such failure of reliability or relevance, the findings of the Administrative Law Judge are not improper, and are affirmed.

### V

Appellant further argues that he should not be found responsible for failing to sound proper fog signals when other operators in the vicinity were not sounding such signals. I agree with the Administrative Law Judge that the actions of others are "by no means conclusive" of the question of Appellant's negligence.

Further, this proceeding is concerned exclusively with the actions or inactions of the Appellant, and the matter of "what others are doing" is irrelevant for the purpose of determining whether or not Appellant was negligent in this case.

#### CONCLUSION

Appellant was negligence in that he wrongfully failed to maintain a proper lookout while navigating during a period of reduced visibility, thereby contributing to a collision between his tow and the SS AMERICAN WHEAT. He also was negligent by wrongfully failing to sound proper fog signals during a period of reduced visibility.

#### ORDER

The order of the Administrative Law Judge dated at New Orleans, Louisiana, on 21 April 1975, is AFFIRMED.

O. W. SILER  
Admiral, U.S. Coast Guard  
Commandant

Signed at Washington, D. C., this 8th day of March 1976.

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